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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Approval of Demand-Side Management Plan of Florida Power & Light Company	))	**Docket No. 941170 - EG** **Filed: July 18, 1995**

MOTION IN OPPOSITION TO "PETITION ON PROPOSED AGENCY ACTION" OF DONNIE NOLLEY

By letter Dated June 28, 1995, Donnie Nolley asked the Commission to "reverse the decision to discontinue solar water heating." The letter was sent "in regards to the approval of Demand-Side Management Plan of Florida Power & Light Company, Docket No. 941170-EG." The letter also contained the heading "Petition on Proposed Agency Action." Pursuant to Florida Administrative Code Rule 25-22.036(2), Florida Power & Light Company files this motion in opposition to the "Petition on Proposed Agency Action" filed by Donnie Nolley and asks that the Commission deny, or in the alternative dismiss the petition. In support of its motion, FPL states:

FPL has not been served with a copy of the letter sent by Mr. Nolley to the Commission. FPL became aware of this letter through review of the Commission's files. Florida Administrative Code Rule 25-22.030(2) requires that "[a] copy of all documents filed pursuant to these rules shall be served on each of the parties no later than the date of the filing." Mr. Nolley has failed to serve FPL as required by Rile 25-22.030(2).

ACK ✓
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APP ____
CAF ____
CMU ____
CTR ____
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SEC 1
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Mr. Nolley has failed to file, as required by Florida Administrative Code Rule 25-22.029, "a petition for a § 120.57 hearing, in the form provided by Rule 25-22.036." Mr. Nolley has not filed a petition, much less a petition in the form provided by Rule 25-22.036. Mr. Nolley letter has omitted the following essential requirements of Rule 25-22.036(7):

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(a)(1) the name of the Commission;

(a)(2) "an explanation of how his or her substantial interests will be or are affected by the Commission determination;"

(a)(3) "a statement of all known disputed issue of material fact. If there are none, the petition must so indicate;"

(a)4. "a concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief;"

(f) " a statement of when and how notice of the Commission's proposed agency action was received."

While some of these omissions are of little substantive consequence, several of the omissions are crucial, such as the failure to explain how the petitioner's substantial interests will be affected and the legal authority entitling the petitioner to relief.

Mr. Nolley has not alleged facts sufficient to demonstrate standing to participate as a party to these proceedings. He has alleged no injury to himself as the owner of a residential auditing company as a result of the discontinuance of FPL's solar water heating incentives. He has not alleged facts that demonstrate that he has standing to represent FPL customers who use his auditing service or who might use solar water heating incentives currently eligible for an FPL incentive. Mr. Nolley's mere "interest" in the continuation of FPL's solar water heating incentives is not sufficient to support standing. He has to allege an actual, immediate injury, which he has failed to do. It cannot even be determined if Mr. Nolley's interest extends beyond an opinion as to whether solar water heating should be promoted to include an economic interest in the provision of such systems. Having failed to allege an immediate injury in fact, Mr. Nolley necessarily has failed to allege that he has suffered or is about to immediately suffer as a result of the Commission's action an injury of the type the governing statute and rule are intended to protect. So, Mr. Nolley's petition fails to

meet either of the standing requirements of Agrico Chemical Co. V. Dept. Of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981).

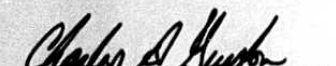
Mr. Nolley also attempts to have relitigated issues previously decided by the Commission. In the recent goals proceeding, the impact on the solar industry of discontinuance of FPL's solar water heating incentives and the cost-effectiveness of such incentives was fully litigated. The Commission approved FPL goals that did not include solar water heating potential, found that FPL's analysis showed that solar water heating measures were not cost-effective, and instructed FPL to seek other funding sources for solar water heating measures. Any attempt to relitigate these issues is barred under the doctrine of administrative finality.

FPL's grounds are more fully developed in the attached supporting Memorandum.

Respectfully submitted,

Steel Hector & Davis
215 South Monroe Street
Suite 601
Tallahassee, Florida 323012

Attorneys for Florida Power
& Light Company

By: 
Charles A. Guyton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of Florida Power & Light Company's Motion In Opposition To "Petition On Proposed Agency Action" Of Donnie Nolley and supporting Memorandum were served by Hand Delivery (when indicated with an *) or mailed this 18th day of July, 1995 to the following:

Martha Carter Brown, Esq.*
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Gunter Building, Room 370
Tallahassee, Florida 32301

James A. McGee, Esq.
Florida Power Corporation
Post Office Box 14042
St. Petersburg, Florida 33733-4042

Jeffrey A. Stone, Esq.
Beggs & Lane
Post Office Box 12950
Pensacola, Florida 32576-2950

Lee L. Willis, Esq.
James D. Beasley, Esq.
Macfarlane, Ausley, et al.
227 South Calhoun Street
Tallahassee, Florida 32302

Debra Swim, Esq.
Legal Environmental
Assistance Foundation, Inc.
1115 North Gadsden Street
Tallahassee, Florida 32303

Jack Shreve, Esquire
John Roger Howe, Esquire
Office of Public Counsel
111 West Madison Street
Room 812
Tallahassee, Florida 32399-1400

Robert Scheffel Wright, Esq.
Landers & Parsons
310 West College Avenue
Third Floor
Tallahassee, Florida 32301

Robert B. Hicks, Esq.
The Independent Savings Plan Company
6302 Benjamin Road, Suite 414
Tampa, Florida 33634

Donnie Nolley
1372 Salina Street, S.E.
Palm Bay, Florida 32909

Charles A. Guyton

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Approval of Demand-Side Management Plan of Florida Power & Light Company	))	**Docket No. 941170 - EG Filed: July 18, 1995**

MEMORANDUM OF LAW SUPPORTING FLORIDA POWER & LIGHT COMPANY'S MOTION IN OPPOSITION TO PETITION ON PROPOSED AGENCY ACTION OF DONNIE NOLLEY

Under the Administrative Procedures Act, specifically Section 120.57(1)(b)1, Florida Statutes (1993), the Commission has discretion whether to grant or deny a request for a Section 120.57(1) request for hearing. Donnie Nolley has filed a letter dated June 28, 1995 that appears to be a request for hearing in Docket No. 941170-EG, although it is clearly not in the form required by the Commission's procedural rules.[1] The letter should be denied or dismissed because it (1) fails to meet the requirements of Rules 25-22.029 and 25-22.036, (2) fails to allege facts sufficient to demonstrate standing, as required by Commission rules, and (3) attempts to relitigate issues resolved by the Commission in the goals docket.

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[1] Rule 25-22.029 Point of Entry Into Proposed Agency Action Proceedings, provides in subsection (4) that, "[o]ne whose substantial interests may or will br affected by the Commission's proposed action may file a petition for a § 120.57 hearing, in the form provided by Rule 25-22.036." Rule 25-22.036, in turn, applies to all § 120.57 proceedings before the Commission (subsection (1)), and requires the initial pleading where the Commission has issued notice of proposed agency action to be entitled "Petition on Proposed Agency Action" (subsection (2)). Subsection (7) of Rule 25-22.036 addresses the form and content of initial pleadings other than notices and orders, including petitions on proposed agency action..

I

MR. NOLLEY MUST DEMONSTRATE STANDING

Under Rule 25-22.036(7)(a)2. all initial pleadings, including petitions on proposed agency action, must include "an explanation of how his or her substantial interests will be or are affected by the Commission determination." The Commission may deny a petition on proposed agency action "if it does not adequately state a substantial interest in the Commission determination...." Rule 25-22.036(9)(b)1.

To have standing to participate in a Section 120.57 proceeding on the basis that the person's substantial interests will be affected, the person must show: "1) that he will suffer an injury in fact of sufficient immediacy to entitle him to a Section 120.57 hearing; and 2) that his injury must be of the type or nature the proceeding is designed to protect." Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981), rev. den. 415 So.2d 1359, 1361 (Fla. 1982). "The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." Id. Both requirements must be satisfied for a person to successfully demonstrate a substantial interest that will be affected by the determination in the proceeding. Id.

A. Injury in Fact

Abstract, indirect, speculative, hypothetical, or remote injuries are not sufficient to meet the "injury in fact" standing requirement. International Jai-Alai Players Association v. Florida Pari-Mutuel Commission, 561 So.2d 1224 (Fla. 3d DCA 1990); Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So.2d 426 (Fla. 1st DCA 1987); Agrico Chem. Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981); Department of

Offender Rehabilitation v. Jerry, 353 So.2d 1230 (Fla. 1st DCA 1978). There must be allegations that either (a) the petitioners have sustained actual injuries at the time of the filing of the petition, or (b) that the petitioners are immediately in danger of sustaining some direct injury as a result of the Commission determination. Village Park, 506 So.2d at 433. It is not enough to allege one's interests will be adversely affected; a petitioner must state with specificity how those interests will be injured. Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988); Grove Isle, Ltd. V. Bayshore Homeowners' Ass'n, Inc., 418 So.2d 1046 (Fla. 1st DCA 1982). In this case, Mr. Nolley has not demonstrated he will suffer an injury in fact as a result of FPL's Demand-Side Management Plan.

Mr. Nolley's letter states that he owns a residential energy auditing company in FPL's service area, that solar water heating is of interest to homeowners, that solar energy is an excellent resource currently being used, that discontinuance of the residential solar water heating program would be a step backwards, and that with FPL's help, contractors can provide homeowners with a cost-effective, renewable energy source.

While it is clear from Mr. Nolley's letter that he is an advocate of solar energy and solar water heating incentives in particular, it is also clear that Mr. Nolley completely fails to state how his substantial interests will be affected by discontinuance of FPL solar water heating incentives. These allegations do not meet the Agrico immediate injury in fact standard. They do not allege either (a) that Mr. Nolley has sustained actual injuries at the time of filing his petition, or (b) that he is immediately in danger of sustaining some direct injury as a result of the challenged Commission action. See, Village Park, 506 So.2d at 433.

No direct injury to Mr. Nolley is alleged. This is not surprising since Mr. Nolley is, at least, two steps removed[2] from participating FPL customers who receive incentives. Remote injuries do not pass the Agrico immediate injury in fact test. International Jai-Alai Players Ass'n, 561 So.2d at 1226.

No attempt is made to explain or show how Mr. Nolley's business's interests will be injured. As a petitioner, Mr. Nolley has to state with specificity how his interests will be injured. Society of Ophthalmology, 532 So.2d at 1286.

Mr. Nolley does not allege that he represents the FPL customers that his business serves. Mr. Nolley is not a trade association, and he makes no showing of facts necessary to demonstrate standing as an association to represent others.[3] Even if he had sufficiently demonstrated an ability to represent FPL customers, he has still not alleged how they have suffered or are likely to immediately suffer a direct injury to their interests. At most these allegations reflect an indirect, conjectural interest that may or may not be affected by approval or even implementation of FPL's DSM Plan. Whether there is any injury depends on the intervening actions of third parties - FPL customers- after the implementation of FPL's proposed plan. In that regard, Mr. Nolley's interests are quite similar to the homeowners' interests found to be insufficient to be an immediate injury in

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[2] Mr. Nolley owns a business, that, in turn, provides auditing services to customers who are currently eligible for FPL solar water heating incentives.

[3] To demonstrate associational standing, an organization must show that (a) a substantial number of its members are affected by the agency action, (b) the subject matter of the agency action is within the association's general scope of interest, and (c) the relief requested is of the type appropriate for a trade association to receive on behalf of its members. See, Florida Home Builders Ass'n v. Dept. of Labor and Employment Security, 412 So.2d 351 (Fla. 1982); Farmworkers Rights Ass'n v. Dept. Of Health and Rehabilitative Services, 417 So.2d 753 (Fla. 1st DA 1982).

fact in the Village Park case. There, as here, any potential injury rested not on approval but on implementation and was contingent on subsequent intervening acts of third parties. 506 So.2d at 433-34. Indirect, speculative interests that may lead to some threat of injury in the future contingent on intervening actions are not of sufficient immediacy to warrant invocation of the administrative review process. Id.

Mr. Nolley does assert that solar water heating is "of interest to homeowners." However, per Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988), having a general "interest" in the policies of investor-owned utilities does not rise to the level of an injury in fact necessary to have standing to request a hearing under Section 120.57.[4] There, the court found allegations of economic interests were not of sufficient "immediacy" to establish an injury in fact and noted:

> **Not everyone having an interest in the outcome of a particular dispute over** an agency's interpretation of law submitted to its charge, or **the agency's application of that law in determining the rights and interests of the members of the government or the public, is entitled to participate as a party in an administrative proceeding to resolve the dispute.** Were that so, each interested citizen could, merely by expressing an interest, participate in the agency's effort to govern, a result that unquestionably would impede the ability of the agency to function efficiently and inevitably cause an increase in the number of litigated disputes well above the number that administrative and appellate judges are capable of handling. Therefore the Legislature must define and the courts must enforce

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[4] In the Florida Society of Ophthalmology case, the Society of Ophthalmology requested a Section 120.57 hearing on the certification applications of all optometrists proposed to be certified by the State Board of Optometry. The Society argued its members' substantial interests would be affected by the optometrists' certifications because allowing optometrists to prescribe certain ocular drugs would encroach on the ophthalmologists' right to practice medicine, the quality of eye care would decline as a result of optometrists being certified to prescribe these drugs, and optometrist certification would confuse the public, causing the ophthalmologists to suffer economic injury.

> certain limits on the public's right to participate in administrative proceedings. The concept of standing is nothing more than a selective method for restricting access to the adjudicative process, whether it be administrative or purely judicial, by **limiting the proceeding to actual disputes between persons whose rights and interests subject to protection are immediately and substantially affected.**
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> Party status will be accorded only to those who will suffer an injury to their substantial interests sought to be prevented by the statutory scheme.

Id. At 1284 (emphasis added).

In this case, Mr. Nolley's statement that "homeowners" solar water heating to be "of interest" is not sufficient to demonstrate an immediate injury in fact. Per Florida Society of Ophthalmology, this "interest" does not constitute a specific immediate injury, and, therefore, is insufficient to meet the injury in fact requirement of the Agrico standing test.

B. Zones of Interest

In addition to requiring an injury in fact of sufficient immediacy, the Agrico standing test also requires that "the injury must be of the type or nature the proceeding is designed to protect." Agrico Chem. Co. v. Department of Envtl. Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1982). This is the so-called "zone of interest" requirement. Florida Society of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279 (Fla. 1st DCA 1988). In determining whether a petitioner has met the zone of interest requirement, the agency or court examines the nature of the injury alleged in the pleading and then determines whether the statute or rule governing the proceeding is intended to protect such an interest. Many cases reject participation in a Section 120.57 hearing when the person seeking the hearing alleges adverse economic injuries akin to those almost alleged in Mr. Nolley's letter.

In Agrico, the court determined that economic injuries alleged by the challenger to result from issuance of a permit were not of the type intended to be protected by the statute (in that case, Chapter 403, F.S.) governing that proceeding. The court stated: "[w]hile the petitioners in the instant case were able to show a high degree of potential economic injury, they are wholly unable to show that the nature of the injury was one under the protection of Chapter 403." Id. at 481. Thus, the challenger was determined not to have standing under Section 120.57. Similarly, in International Jai-Alai Players Ass'n v. Florida Pari-Mutuel, 561 So. 2d 1224 (Fla. 3d DCA 1990), the court determined that statutory provisions governing jai-alai scheduling were not designed to protect the economic interests of jai-alai players who alleged they would be injured by scheduling changes implemented pursuant to the statutory provisions. See also, Shared Services Inc. v. State Dept. of Health and Rehabilitative Services, 426 So.2d 56 (Fla. 1st DCA 1983); City of Sunrise v. South Florida Water Management District, 615 So.2d 746 (Fla. 4th DCA 1993).

Some statutory schemes have been construed by the courts as properly considering economic interests, and, in such instances, courts have found allegations of adverse effects to economic interests to be sufficient to meet the "zone of interest" requirement of the Agrico standing test. For example, in Boca Raton Mausoleum v. Department of Banking and Finance, 511 So. 2d 1060 (Fla. 1st DCA 1987), the court determined that reduced contributions to the perpetual fund resulting from the reduced sale of burial spaces was a type of injury contemplated by the Florida Cemetery Act. In Baptist Hospital, Inc. v. Department of Health and Rehabilitative Services, 500 So. 2d 620, 625 (Fla. 1st DCA 1986), the court determined that economic injury is a significant substantial interest for purposes of conferring standing in certificate of need proceedings. Thus, the general rule regarding whether economic interests fall within the zone of interest in Section 120.57 is that a claim

of standing by third parties based solely upon economic interests is not sufficient unless the statute itself contemplates consideration of such interests. Boca Raton Mausoleum, 511 So. 2d 1060, 1064 (Fla. 1st DCA 1987).

In this case, Mr. Nolley's economic interests as an owner of a residential energy auditing company do not fall within the zone of interest of the Florida Energy Efficiency and Conservation Act ("FEECA"), Sections 366.80 - .85, Florida Statutes (FEECA), Section 403.519, Florida Statutes (the governing statute), or Florida Administrative Code Rule 25-17.0021 (the governing rule).[5] FEECA's statement of legislative intent in Section 366.81, Florida Statutes, begins by recognizing the importance of "utiliz[ing] the most efficient and **cost-effective** energy conservation systems in order to protect the health, prosperity, and general welfare of the state and its citizens. Section 366.81 also states that "the use of solar energy" is to "be encouraged," but this same sentence, which also encourages cogeneration, has been interpreted by the Commission as being limited by "cost-effectiveness."[6]

Nothing in FEECA or Rule 25-17.0021 provides intent to protect the kinds of economic interest Mr. Nolley asserts in this proceeding. It is not even clear from the letter if Mr. Nolley's livelihood would even be affected by discontinuance of FPL solar water heating incentives. If so, then Mr. Nolley's livelihood depend on solar heating equipment that is not cost-effective under the

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[5] The other statutes referred to in the joint petition, Sections 288.041 and 187.201, Florida Statutes, do not provide the petitioners a statutory right to intervene in Commission cases. Therefore, they are not relevant to whether the petitioners have standing.

[6] Under the Commission's cogeneration rules, cogeneration must be cost-effective - at or below avoided cost. See, Rule 25-17.080-091, F.A.C. Encouraging a FEECA option does not mean offering it when it is not cost-effective.

Rate Impact Measure and Participants tests.[7] Thus, the economic interests Mr. Nolley appears to imply is merely protecting his livelihood through protecting his business markets. FEECA was never intended to serve as a vehicle for promoting particular businesses or protecting business markets. Mr. Nolley's economic interests are beyond the scope of the energy conservation purposes FEECA is designed to promote and protect. Mr. Nolley has failed to meet the "zone of interest" requirement of the Agrico standing test. Accordingly, his petition for a Section 120.57 hearing should be dismissed.

II.

MR. NOLLEY'S ATTEMPT TO RELITIGATE ISSUES IS BARRED

In his letter Mr. Nolley makes allegations and raise issues of fact that have already been addressed by the Commission. Mr. Nolley seeks to relitigate matters the Commission has resolved in the lengthy goals proceeding. These allegations should not be considered by the Commission, and cannot form the basis for a cause of action for Mr. Nolley. Mr. Nolley is barred from raising these issues by the doctrine of administrative finality.

The doctrine of administrative finality has been developed in Florida largely through cases on appeal from this Commission. It was first recognized and applied in Peoples Gas System, Inc. v. Mason, 187 So.2d 325 (Fla. 1966), where the Supreme Court outlined the concept:

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[7] The Commission in the Conservation Goals proceeding approved FPL's goals based on conservation measures cost-effective under the RIM and Participants tests. Order No. PSC-94-1313-FOF-EG at 22, 32. Those goals did not include any solar measures. The Commission also made a finding that "FPL reports a negative cost-benefit ratio of 0.8 and 0.26 under the RIM and TRC tests respectively." Id. at 26.

> [O]rders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision on such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.

Peoples Gas, 187 So.2d at 339. Subsequent cases have noted exceptions for changed circumstance and extraordinary circumstances, but the doctrine has repeatedly been applied by Florida courts to the decisions of administrative agencies. See, Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679 (Fla. 1979); Richter v. Florida Power Corp., 366 So.2d 798 (Fla. 2d DCA 1979); Russell v. Dept. Of Business and Professional Regulation, 645 So.2d 117 (Fla. 1st DCA 1994).

A. The Impact of Discontinuance of FPL's Residential Solar Water Heating Program on the Solar Industry Has Already Been Litigated

In his letter, Mr. Nolley seeks to put at issue what the effect on the solar industry would be of discontinuance of FPL's water heating program. This issue was fully and fairly litigated in the recent goals proceeding. The Commission's decision in that case was not to include solar water heating measures in the conservation goals approved for FPL, and, instead, to have FPL seek an alternative source of funding to promote the installation of solar water heating and other renewable measures. FPL relied upon this determination by the Commission in the formulation of its DSM plan. Consequently, the doctrine of administrative finality bars Mr. Nolley from attempting to relitigate this issue.

B. Consideration of the Cost-Effectiveness of Solar Water Heating Measures is Barred

In his letter Mr. Nolley attempts to put at issue whether FPL's solar water heating offerings are cost-effective. In the recent goals proceeding, the Commission examined the cost-effectiveness

of FPL's solar water heating measures and made a specific finding that FPL's analysis showed they were not cost-effective. Order No. PSC-94-1313-FOF-EG at 26. FPL has relied on this Commission determination and not included solar water heating measures among the programs that it offers in its DSM plan. The doctrine of administrative finality bars Mr. Nolley from attempting to relitigate this issue before the Commission.

CONCLUSION

Mr. Nolley has failed to satisfy the requirements of Rules 25-22.029 and 25-22.036(7). Mr. Nolley has totally failed to "adequately state a substantial interest in the Commission determination." His letter which may be intended to be a Petition on Proposed Agency Action should be denied pursuant to Florida Administrative Code Rule 25-22.036(9)(b)1. In addition, Mr. Nolley seeks to relitigate matters resolved by the Commission; such efforts are barred by the doctrine of administrative finality.

Respectfully submitted,

Steel Hector & Davis
215 South Monroe Street
Tallahassee, Florida 32301

Attorneys for Florida Power
& Light Company

By: Charles A. Guyton
Charles A. Guyton

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